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No. 169

In the Supreme Court of the United States

OCTOBER TERM, 1968

ROBERT BOLIVAR DEPUGH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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On September 30, 1966, a one-count indictment was returned against petitioner in the United States District Court for the Western District of Missouri charging that, while under indictment by the State of Missouri for "unlawfully, wilfully, and feloniously having in his possession and under his control various bombs and bomb shells" in violation of Section 564.-580, Missouri Revised Statutes, a crime punishable for a term exceeding one year, petitioner wilfully

caused the transportation of a revolver in interstate commerce, in violation of the Federal Firearms Act, 15 U.S.C. 902(e)[1] and 18 U.S.C. 2 (I R. I). On January 27, 1967, the district court denied petitioner's motion to dismiss the indictment, rejecting his claim that the underlying state indictment (against which a motion to dismiss was then pending) was invalid and that the federal statute was unconstitutional as applied (266 F. Supp. 453; Pet. App. C, 19-23). On January 31, 1967, petitioner entered a plea of *nolo contendere* to the federal charge (I R. I 21; II R. 6) and was sentenced to imprisonment for one year, the sentence to run concurrently with the sentences imposed under a related federal conviction (I R. I 21; II R. 8-9).[2]

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[1] 15 U.S.C. 902(e), as amended in 1961 (75 Stat. 757), provides: "It shall be unlawful for any person who is under indictment or who has been convicted of a crime punishable by imprisonment for a term exceeding one year or who is a fugitive from justice to ship, transport, or cause to be shipped or transported in interstate or foreign commerce any firearm or ammunition."

[2] That case—involving conviction on various counts charging violations of provisions of the National Firearms Act, *i.e.*, 26 U.S.C. 5811, 5821, 5841—is presently pending on appeal in the Eighth Circuit. *DePugh* v. *United States*, No. 18,732 (C.A. 8).

At the time of sentencing in this case, government counsel advised the trial court that if the case had gone to trial it would have been proved that on July 23, 1966, petitioner purchased eight revolvers in Des Moines, Iowa, and that on August 20, 1966, he was arrested in possession of certain of these weapons in Missouri, under an indictment charging conspiracy and substantive violations of the National Firearms Act.

On March 9, 1967, about a month after the imposition of sentence and notice of appeal, the Circuit Court of Jackson County, Missouri, sustained petitioner's motion to dismiss the state indictment and quashed that indictment on the ground that it did "not contain an essential element of the statutory offense, to-wit: 'Intent to use the [bombs and bombshells in petitioner's control and possession] unlawfully against the person or property of another'" (Pet. App. D, 25, 24-26). On appeal from the earlier conviction involved in the instant case, the court of appeals held that the subsequent dismissal of the state indictment did not invalidate the federal charge (Pet. App. A, 11-17).

1. In holding that the defect in the state indictment which led to its dismissal subsequent to petitioner's conviction for violating 15 U.S.C. 902(e) did not render that conviction invalid, the court of appeals was clearly correct. The statute proscribes the transporting or shipping of firearms in interstate commerce by convicted felons, fugitives from justice, and persons, like petitioner, who are under indictment for felonies. Inclusion of the latter category of individuals is entirely consistent with the overall congressional scheme. Congress could reasonably conclude that when persons are under indictment for a serious crime, the potential of their misuse of firearms is great enough to warrant barring their carrying of firearms in interstate commerce. *Schook* v. *United States*, 337 F. 2d 563, 567-568 (C.A. 8); *Quinones* v. *United States*, 161 F. 2d 79, 80-81 (C.A. 1), certiorari denied, 331 U.S. 833. There is thus no need for the

federal court to consider or pass on the ultimate validity of the state indictment. So far as the indictment aspect of the statute is concerned, it results in a limited disability for a short period until the charges in the indictment are terminated by dismissal, acquittal or conviction.[3]

There is no suggestion in the record that the state indictment was procured by fraud or was a mere stratagem utilized to permit invocation of the federal statute. The Missouri indictment was returned by a regularly constituted grand jury. That body necessarily found that there was probable cause to believe that a felony had been committed by petitioner. Petitioner was subject to this indictment at the time he committed the federal offense and at the time of his conviction on the federal charge. In these circumstances, as the court of appeals pointed out, the fact that the indictment was ultimately dismissed because of "inept draftsmanship" provided no basis for retroactively immunizing petitioner from federal prosecution (Pet. App. A, 17).[4] Cf. *Braswell* v. *United*

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[3] Moreover, as the court of appeals noted (Pet. App. A, 16), "Common sense * * * dictates that federal law enforcement should not hinge on the outcome of a state charge * * *."

[4] While the Missouri court stated that the indictment was "fatally defective" and suggested that it could not be amended by information (Pet. App. D, 25, 26), that hardly renders the federal conviction retroactively invalid. As the court of appeals stated (Pet. App. A, 17): "As long as the indictment was pending in state court, violation of the federal statute by defendant subjected him to the indictment and conviction from which he appeals. All of the elements of the federal crime were included in the federal indictment since

States, 224 F. 2d 706, 710 (C.A. 10), certiorari denied, 350 U.S. 845.

2. Contrary to petitioner's contention (Pet. 6-7), the statute as thus construed does not violate the Second Amendment right to bear arms. *Cases* v. *United States*, 131 F. 2d 916, 921-922 (C.A. 1), certiorari denied, *sub nom. Velazquez* v. *United States*, 319 U.S. 770; *Tot* v. *United States*, 131 F. 2d 261, 266-267 (C.A. 3), certiorari denied on this issue, 317 U.S. 623, reversed on other grounds, 319 U.S. 463.

The Second Amendment provides:

> A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

Courts which have construed this constitutional provision have held that it confers rights not on individuals, but "as a protection for the States in the maintenance of their militia organizations against possible encroachment by the federal power." *United States* v. *Tot*, *supra*, 131 F. 2d at 266, and authorities there cited; see also *United States* v. *Cruikshank*, 92 U.S. 542, 553; *Presser* v. *Illinois*, 116 U.S. 252, 265.

In any event, the rights conferred by the Second Amendment are not absolute. *Robertson* v. *Baldwin*, 165 U.S. 275, 281-282; *Konigsberg* v. *State Bar of California*, 366 U.S. 36, 50, n.10. Congress could properly, in exercise of its power under the Commerce Clause, impose restrictions against the transportation of guns as an aid to local law enforcement. See

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the state indictment was pending at the *time of the* federal indictment."

Brooks v. *United States*, 267 U.S. 432, 436; *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241, 253-257, and cases there cited.

3. Finally, petitioner's other constitutional claims (Pet. 7, 8) are without substance. 15 U.S.C. 902(e) does not sanction a curtailment of constitutional rights by discriminating in an invidious manner against those under felony indictments. The congressional classification is a demonstrably reasonable one (see *supra*, p. 3), and in no respect constitutes a prejudgment of guilt on the charge stated in the underlying indictment.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.[5]

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Solicitor General.

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[5] Petitioner is presently a fugitive under an indictment returned in February 1968 charging conspiracy to commit bank robbery in the United States District Court for the Western District of Washington. He is believed to be hiding in Canada. While he is not in default in this case, since he was on bond pending appeal, we bring these facts to the attention of the Court since it will not ordinarily consider a case when the defendant is a fugitive. See *Eisler* v. *United States*, 338 U.S. 189; but cf. *Doyle* v. *United States*, certiorari denied, 382 U.S. 843, where the Court denied a petition even though the defendant was a fugitive.

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